UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2012 MSPB 38

Docket No. AT-0752-11-0058-I-1

Shawn Gregory McNeil,

Appellant,

v.

Department of Justice,

Agency.

March 21, 2012

Thomas F. Muther, Jr., Esquire, Denver, Colorado, for the appellant.

Elizabeth K. Blackmon, Washington, D.C., for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman

OPINION AND ORDER

¶1 The agency petitions for review of an initial decision that reversed its removal action. For the following reasons, we DENY the agency's petition for review for failure to meet the criteria for review set forth at 5 C.F.R. § 1201.115(d), and AFFIRM the initial decision AS MODIFIED by this Opinion and Order, still reversing the appellant's removal.

BACKGROUND

¶2 The agency removed the appellant from his GL-08 Correctional Officer (Senior Officer Specialist) position based on a charge of providing a urine

specimen that tested positive on June 7, 2010, for an illegal drug, i.e., marijuana. Initial Appeal File (IAF), Tab 4 at 114-18, 146-47.

¶3 After a hearing, the administrative judge reversed the agency's action. IAF, Tab 21, Initial Decision (ID) at 2, 13. The administrative judge found that the appellant did not challenge the agency's drug-testing procedures or the laboratory results. ID at 2. Instead, the appellant's sole defense was that his estranged and psychologically-troubled wife tricked him into smoking a marijuana-laced cigar and then reported the drug use to the warden, and that his ingestion of marijuana was unintentional. ID at 2-3. The administrative judge found that, although the agency proved that the appellant tested positive for marijuana metabolite, the agency was required to prove that the appellant's ingestion of marijuana was intentional to satisfy the efficiency of the service standard. ID at 4-5. The administrative judge applied such a requirement because (1) the innocent ingestion of a controlled substance is not a criminally culpable act, and thus not an "illegal" use of that substance, (2) the administrative judge was aware of no precedent of the Board or U.S. Court of Appeals for the Federal Circuit holding that an unintentional use of a controlled substance can satisfy the agency's burden of demonstrating a nexus between the conduct and the efficiency of the service, and (3) the Federal Circuit held in *Torres v. Department of Justice*, 343 F. App'x 610 (Fed. Cir. 2009), that it does not promote the efficiency of the service for an agency to remove an employee for using an illegal substance when the employee could not be guilty of criminal conduct because he did not know the substance was a controlled substance. ID at 5-6. The administrative judge held that the agency failed to show that the appellant intentionally ingested marijuana, that the testimony and demeanor of the appellant and his wife were consistent, credible, and sincere, and that other evidence corroborated the appellant's version of events. ID at 6-13.

ANALYSIS

¶4 The agency asserts on review that the administrative judge should not have found that the appellant's spouse was credible because she has a clinically-diagnosed bipolar disorder, openly admitted to making numerous false statements, made numerous prior inconsistent statements, and was biased given her relationship with the appellant. Petition for Review (PFR) File, Tab 1 at 11. The Board must, however, give deference to an administrative judge's credibility determinations when they are based, explicitly or implicitly, on the observation of the demeanor of witnesses testifying at a hearing; the Board may overturn such determinations only when it has "sufficiently sound" reasons for doing so. *Haebe v. Department of Justice*, 288 F.3d 1288, 1301 (Fed. Cir. 2002).

¶5 After referencing the factors set forth in *Hillen v. Department of the Army*, 35 M.S.P.R. 453, 458 (1987), to be considered in making credibility determinations, the administrative judge found that the appellant testified that his estranged wife suffered from clinically-diagnosed bipolar disorder throughout their marriage, that the condition permanently disabled her, and that at the end of April 2010, approximately 5 weeks before the drug test at issue, the appellant attempted to leave his wife in favor of another woman, sparking an escalating domestic conflict. ID at 6-7. The appellant testified that as he tried to move out during the first week of May 2010, his wife angrily blocked him from taking his personal property from the marital residence, prompting him to document the situation with the county sheriff and request their intervention. Hearing Transcript (HT) at 64; IAF, Tab 13 at 27. The appellant supported this testimony with a memorandum he provided to his supervisor on May 6, 2010, which stated in relevant part,

> I would like to inform you, for informational purposes, that on multiple occasions over the last week the Citrus County Sheriff's [sic] have been called to my previous home. Each time that I attempt to remove personal belonging[s] f[r]om my home, my estranged wife will allow me to retain a few items and then begins blocking my way

> and telling me that I'm done getting items. On each occasion I have notified the Citrus County Sheriff's Office, to ensure that false charges are not filed against me, as false charges have been filed against me in the past.
>
> Additionally, my wife has threatened to do everything in her power to attempt to create any type of legal, professional or financial issues that she can create.

IAF, Tab 13 at 27.

¶6 The appellant testified that the domestic conflict with his wife escalated on May 24, 2010, when she took his pickup truck from in front of his new home without permission. HT at 65. The appellant filed a police report about this with the local sheriff's office, which states,

> On 052410 at approximately 1820 hours, writer made contact with the Reportee, Shawn McNeil, via telephone who advised his wife who he is recently separated from . . . had come to this new home and taken his vehicle while he was out of town. The Reportee advised they are still married at this time and knows that this is a civil matter, but because he is a Department of Corrections employee, he wished to have a report generated due to the fact that his uniforms and equipment that he uses at the jail w[ere] in this vehicle.

IAF, Tab 13 at 32. The appellant also informed his supervisory chain of the theft of his truck and duty equipment in a memorandum dated May 29, 2010, which agreed in all respects with his hearing testimony and the police report. IAF, Tab 13 at 28; *see* ID at 8. According to the appellant, his wife refused to return the truck and his duty equipment and he did not get it back until it was found by the police in a wooded area not far from his wife's residence on the afternoon of June 4, 2010. IAF, Tab 13 at 33. The appellant's version of this event was corroborated by a written statement signed by the appellant's wife in which she explains that she suffers from bipolar disorder and that, during a major manic episode in May 2010, she took the appellant's truck and hid it in a wooded area. *Id*. at 34. Within this same statement she claims that several other people were in the truck while she had it, and that one of them placed a marijuana-laced cigar in

the truck. *Id*. She then stated that "[m]y husband would have had no knowledge that the cigar left in his vehicle contained marijuana and did not belong to him, as he smokes the same brand." *Id*.

¶7 The appellant testified that on June 4, 2010, his wife again escalated her behavior against him when at approximately 1:45 p.m. he observed her in the prison's parking lot beside his car as he left work. HT at 67. He saw that she had his cellular telephone, which he had left locked inside his car. IAF, Tab 13 at 33; HT at 67. The appellant's wife did not have a key to his car so the appellant initially did not know how she had retrieved his cell phone. IAF, Tab 13 at 33. When the appellant requested his cell phone back his wife complied but said, "I hope that you don't get fired, I told your warden about the weed in your car." *Id*.; HT at 67. The appellant testified that he searched his car and found a plastic bag containing a small amount of marijuana. HT at 67; IAF, Tab 13 at 33.

¶8 The appellant's recollection of the June 4, 2010 incident is supported by the hearing testimony of Lieutenant Jeffrey Kajander, who testified that while he was working in the lobby of the prison that afternoon the appellant approached him saying that his wife had planted marijuana in his car, showed him a small bag of marijuana allegedly from the car, and asked him what he should do with it. HT at 137-38, 141-42. Lieutenant Kajander advised the appellant to call local law enforcement. HT at 138, 142. The appellant testified that he called the police, who advised him to dispose of it in an anonymous police office drop box. HT at 37-38, 67-68. The appellant followed those instructions, HT at 68, and reported the incident in a memorandum to his immediate supervisory chain the next day, June 5, 2010, IAF, Tab 13 at 15.

¶9 The appellant's testimony about his wife allegedly breaking into his car, planting marijuana inside, and informing the warden that there were drugs within was corroborated by the appellant's wife during her hearing testimony. She admitted that she bought a replacement key for the appellant's car from the dealership because she did not have a key for it, and admitted that she took the

appellant's cell phone from the car and reviewed his cell phone logs. HT at 145. The record includes a copy of the receipt for the purchase of the key. IAF, Tab 4 at 143. She also admitted that she directed a friend to plant marijuana in the car while she went inside to try to convince the warden to search the appellant's car for drugs. HT at 145-48. Kevin Rison, the Human Resource Manager for the prison, was present when the appellant's wife visited the warden on June 4, 2010, and prepared a detailed summary of the conversation that day. IAF, Tab 13 at 22-23. According to Mr. Rison, the appellant's wife told the warden that the appellant was a frequent marijuana user and currently had marijuana in his car, that he routinely violated a restraining order she had against him, that he had been arrested in November 2009 for driving under the influence of alcohol, and that he had frequently passed illicit notes to prison inmates in exchange for monetary and other gifts from an outlaw motorcycle gang. *Id*.; HT at 87-89. During the hearing, the appellant's wife recanted under oath all of the allegations she had made about the appellant to the warden on June 4, 2010. HT at 153-54, 157-58, 164. The administrative judge found the recanting of the allegations credible because

> there is no indication whatsoever in the file that a restraining order was ever actually in place against the appellant, that the appellant had a recent drunk driving arrest, or that he was passing clandestine notes to prisoners on behalf of outlaw biker gangs. I further find her testimony that she had marijuana planted in the appellant's car that day to be credible based on the appellant's reaction to finding these drugs, the witness'[s] clear intention on June 4 of saying or doing anything she deemed necessary to harm the appellant's career, and [her] truthful demeanor while testifying at the hearing.

ID at 10. The administrative judge found that the demeanor of the appellant's wife during the hearing

> was extremely nervous, immensely sad, and very troubled. She explained that she suffers from bipolar disorder for which she receives disability compensation. She testified at length about repeatedly making false allegations against Mr. McNeil during manic episodes in the past and more recently on June 4, 2010. She sobbed

> and trembled throughout her testimony and expressed what appeared to be sincere regret about her conduct and what she openly admitted were false accusations leading to her husband's termination.

ID at 10-11. The administrative judge further found that there was no evidence in the record of any significant personal or financial motive for the appellant's wife to come to her estranged husband's aid through fabricating testimony on his behalf, given that the only support the appellant provided her was payment of her monthly car loan, and the appellant offered neither reconciliation nor any financial gain in exchange for her testimony. ID at 11. The administrative judge held that the agency produced no evidence or contrary witness testimony and was unable to impeach her veracity about framing her husband and fabricating allegations despite rigorous cross examination, and that her "weeping and trembling throughout her testimony . . . demonstrate her genuine remorse and shame for her actions and their consequences." *Id*.

¶10 The appellant testified that, after he was informed late on June 4, 2010, that the police had found his truck, he retrieved it from the woods one-half mile from his wife's house that afternoon. HT at 37-38. He explained that when the truck was originally taken, there had been three or four "Black and Mild" cigars inside the truck. HT at 39, 60-61. The appellant's wife admitted at the hearing that while she had the truck one of her friends took a "Black and Mild" brand cigar in the appellant's truck, laced it with marijuana to create a "blunt," and left it in the truck looking like a normal unwrapped tobacco cigar. HT at 146-50, 154. The appellant indicated that the night his truck was returned he drank 3 or 4 beers, retrieved an unwrapped "Black and Mild" cigar from the truck's ashtray, and smoked it. HT at 54, 60. The appellant testified that the cigars have a very strong taste, he had been drinking that evening, and he did not notice anything unusual. HT at 38-39. He testified that he smoked part of the cigar, then drank more beer before finishing the cigar and going to bed. HT at 60. The appellant testified that his wife called him on June 9, 2010, the evening before he was

informed of the positive test result, asked him if he had smoked the cigar that was in his truck, and told him that it had marijuana in it. HT at 45, 75.

¶11 The administrative judge found that the agency asked the appellant questions about the details of smoking the allegedly tainted cigar, but presented no evidence to refute or impeach his testimony, and that the agency tested the appellant for drug use on June 7, 2010, 2½ days after he allegedly smoked the cigar laced with marijuana. ID at 12. Regarding the appellant's credibility, the administrative judge found as follows:

> I note as an initial matter that his statements about inadvertently using marijuana were at all times internally consistent. His testimony during the hearing closely matched his earlier oral and written statements to the deciding official. I also note that his testimony was not contradicted by any other witness or evidence. To the contrary, his testimony was supported by contemporaneous reports he provided to his supervisory chain about the escalating troubles with [his wife] and her increasingly sophisticated efforts to get him in trouble. His testimony was also consistent with a contemporaneous police report he filed documenting his wife's theft of his truck. His testimony also matched the testimony of [his wife] who candidly admits taking his truck, breaking into his car, and causing marijuana to be placed in both vehicles. I also note that the testimony of Lieutenant Kajander and Mr. Rison both support a finding that the appellant was being targeted by his wife with unfounded allegations of marijuana use and other false tales.
>
> I was further impressed by the appellant's forthright demeanor throughout the proceedings. His demeanor while testifying about his wife's mental illness and the events leading up to the drug test was sorrowful and frank. He answered all questions quickly and politely, with no trace of obvious evasion or defensiveness.
>
> Measured against the strong evidence supporting the credibility of the appellant's innocent ingestion defense, the agency produced no contrary witnesses or evidence. I further note that the agency's own Medical Review Officer corroborated the plausibility of the appellant's story by testifying that the marijuana lab results could have come from a single use of marijuana a few days before the test.

ID at 12-13. The administrative judge therefore concluded that the agency had failed to show that the appellant's ingestion of marijuana was intentional. ID

at 13. We defer to the administrative judge's credibility determinations because they are explicitly based on his observation of the demeanor of the witnesses. *See Haebe*, 288 F.3d at 1301. Moreover, the agency's arguments as to why the appellant's wife should be found not credible were addressed and discounted by the administrative judge, and the agency has not otherwise provided sufficiently sound reasons for overturning the administrative judge's credibility findings. Thus, we agree with the administrative judge that the appellant did not intentionally ingest marijuana.

¶12 The agency asserts on review that intent was not an element of the charged misconduct and should not be inferred, and that the appellant's removal was consistent with Executive Order 12,564, which states that the use of illegal drugs on or off duty by federal employees impairs the efficiency of the government by undermining public confidence in government, making it more difficult for other employees to perform their jobs effectively, and posing a health and safety threat to members of the public and other federal employees. PFR File, Tab 1 at 5-6. The administrative judge, however, did not find that intent was an element of the sustained charge. ID at 4-5. Moreover, the agency did not charge the appellant with "use" of illegal drugs; rather, it charged him with providing a specimen that tested positive for an illegal drug. IAF, Tab 4 at 146.

¶13 The agency also contends that there is a nexus between the charged misconduct and the efficiency of the service because (1) the appellant's conduct affected his and his coworkers' job performance when he had nearly six times the acceptable level of marijuana metabolite in his system when he was at work while being tested, (2) the appellant's conduct affected management's trust and confidence in his job performance because he allegedly smoked an unwrapped cigar that his estranged wife left in the appellant's vehicle after the estranged wife allegedly planted a bag of marijuana in the vehicle earlier that day, and the appellant testified that he is familiar with the smell of marijuana, and (3) the appellant's conduct affected the agency's mission because a single drug-related

lapse by a law enforcement employee like the appellant could have irreversible and catastrophic consequences, and is "antithetical to the Agency's law enforcement mission and rehabilitative programs that the Agency is responsible for administering and monitoring." PFR File, Tab 1 at 7-10. The agency further asserts that the administrative judge improperly applied *Torres*, an unpublished, nonprecedential decision that involved a charge of "Use of an Illegal Substance," which implicates willful or knowing use, unlike the charge in this case which did not implicate willful or intentional behavior. *Id*. at 10-12.

¶14 We recognize that this case appears to involve a novel legal question regarding whether the agency met its burden of proving nexus. Nevertheless, under the particular circumstances of this appeal, we need not resolve the question of whether the agency proved a nexus between the grounds for its action and the efficiency of the service. Even assuming that such a nexus exists, we find that the penalty of removal is unreasonable and that the maximum reasonable penalty is no penalty at all. *See Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 302 (1981) (the appropriateness of a particular penalty is a separate and distinct question from that of whether there is an adequate relationship or nexus between the grounds for an adverse action and the efficiency of the service).

¶15 Despite the agency's assertion on review that the deciding official considered all relevant factors and exercised management discretion within the tolerable limits of reasonableness in imposing the penalty of removal, PFR File, Tab 1 at 10-11, we disagree. As the administrative judge found, prior to his removal the appellant worked for the agency for 15½ years. HT at 37, 79-80; ID at 4. There is no indication in the record that the appellant tested positive for illegal drug use at any time before the June 2010 urinalysis, the appellant's annual performance evaluations since 2003 had been at the highest possible level, and the appellant received a Special Act Award from the agency based on his consistently excellent evaluations. HT at 80. At the time of the urinalysis at issue, the appellant had been temporarily promoted by the agency into a

supervisory Activities Lieutenant position overseeing the work of other correctional officers. HT at 35, 77-78. In addition, the agency did not identify any prior discipline in its notice of proposed removal. IAF, Tab 4 at 146-47; *see Lopes v. Department of the Navy*, 116 M.S.P.R. 470, ¶ 5 (2011) (when an agency intends to rely on aggravating factors, such as prior discipline, as the basis for the imposition of a penalty, such factors should be included in the advance notice of adverse action so that the employee will have a fair opportunity to respond to those factors before the agency's deciding official).

¶16 We further find that a major mitigating factor in this case is the lack of intentional conduct by the appellant and the fact that the proven charge reflects a technical, inadvertent offense representing a single, isolated incident that was not committed maliciously or for gain. *See Douglas*, 5 M.S.P.R. at 305. In fact, in light of our finding that the appellant did not intentionally ingest an illegal drug, we find that he has excellent potential for rehabilitation assuming that any such "rehabilitation" in the traditional sense is even necessary. Moreover, there are significant mitigating circumstances surrounding the proven charge in this case, namely, the harassment and malicious actions inflicted upon the appellant by his estranged wife. *See id*. (relevant factors to be considered in evaluating the penalty include mitigating circumstances surrounding the offense such as harassment and "malice or provocation on the part of others involved in the matter"). As set forth above, the appellant's estranged wife engaged in multiple actions, all designed to disrupt the appellant's work life. The appellant's wife attempted to "plant" a bag of marijuana in the appellant's car, informed the warden of numerous false and derogatory allegations against the appellant that led to the decision to test the appellant for marijuana, and had a friend place a marijuana-laced cigar in the appellant's truck, knowing that it was only "a matter of time" before he would run out of cigars, look in his truck, and eventually smoke it. HT at 162. In essence, the facts suggest that there would have been no positive drug test in the absence of such malicious actions.

¶17 The clarity with which the appellant was on notice of the rules violated does not weigh heavily in this case given that such notice could not have affected the appellant's behavior, which did not involve any conscious misconduct on his part. Moreover, there is no allegation or indication by the agency that the appellant's ability to perform the duties of his job on the day in question was impacted by the positive drug test. The appellant and his wife have separated, the appellant intends to file for divorce, HT at 55-56, and thus the likelihood of such events occurring in the future have been reduced given that the appellant has now been placed on clear notice of the extent of his wife's schemes.

¶18 While we recognize the vital importance of agency drug-testing programs, given that the use of illegal drugs, on or off duty, by federal employees is inconsistent not only with the law-abiding behavior expected of all citizens, but also with the special trust placed in such employees as servants of the public, and while we do not in any way intend to minimize the seriousness of a typical positive drug test by an employee subject to such tests, we find that the agency has not met its burden of proving that a penalty is warranted here. *See Skinner v. Department of the Army*, 32 M.S.P.R. 586, 587-88 (1987) (finding that, if charged, the appellant's technical violation of signing her supervisor's name to time and attendance reports would be de minimus and no penalty would promote the efficiency of the service); *Lee v. Department of the Navy*, 6 M.S.P.R. 355, 357 (1981) (reversing a removal based on a finding that no lesser penalty would satisfy the efficiency of the service requirements given the de minimus nature of the offense). The agency has simply not shown the reasonableness of disciplining the appellant for a positive drug test under the unique circumstances in this case.

¶19 Accordingly, we DENY the agency's petition for review and AFFIRM the initial decision AS MODIFIED, REVERSING the agency's removal action.

ORDER

¶20 We ORDER the agency to cancel the removal action and restore the appellant effective September 20, 2010. *See Kerr v. National Endowment for the Arts*, 726 F.2d 730 (Fed. Cir. 1984). The agency must complete this action no later than 20 days after the date of this decision.

¶21 We also ORDER the agency to pay the appellant the correct amount of back pay, interest on back pay, and other benefits under the Office of Personnel Management's regulations, no later than 60 calendar days after the date of this decision. We ORDER the appellant to cooperate in good faith in the agency's efforts to calculate the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it carry out the Board's Order. If there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the agency to pay the appellant the undisputed amount no later than 60 calendar days after the date of this decision.

¶22 We further ORDER the agency to tell the appellant promptly in writing when it believes it has fully carried out the Board's Order and to describe the actions it took to carry out the Board's Order. The appellant, if not notified, should ask the agency about its progress. *See* 5 C.F.R. § 1201.181(b).

¶23 No later than 30 days after the agency tells the appellant that it has fully carried out the Board's Order, the appellant may file a petition for enforcement with the office that issued the initial decision in this appeal if the appellant believes that the agency did not fully carry out the Board's Order. The petition should contain specific reasons why the appellant believes that the agency has not fully carried out the Board's Order, and should include the dates and results of any communications with the agency. 5 C.F.R. § 1201.182(a).

¶24 For agencies whose payroll is administered by either the National Finance Center of the Department of Agriculture (NFC) or the Defense Finance and Accounting Service (DFAS), two lists of the information and documentation necessary to process payments and adjustments resulting from a Board decision

are attached. The agency is ORDERED to timely provide DFAS or NFC with all documentation necessary to process payments and adjustments resulting from the Board's decision in accordance with the attached lists so that payment can be made within the 60-day period set forth above.

¶25 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT REGARDING YOUR RIGHT TO REQUEST ATTORNEY FEES AND COSTS

You may be entitled to be paid by the agency for your reasonable attorney fees and costs. To be paid, you must meet the requirements set out at Title 5 of the United States Code (5 U.S.C.), sections 7701(g), 1221(g), or 1214(g). The regulations may be found at 5 C.F.R. § § 1201.201, 1201.202 and 1201.203. If you believe you meet these requirements, you must file a motion for attorney fees WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION. You must file your attorney fees motion with the office that issued the initial decision on your appeal.

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court

no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

_____
William D. Spencer
Clerk of the Board
Washington, D.C.

DFAS CHECKLIST

INFORMATION REQUIRED BY DFAS IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT CASES OR AS ORDERED BY THE MERIT SYSTEMS PROTECTION BOARD

AS CHECKLIST: INFORMATION REQUIRED BY IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT CASES

CIVILIAN PERSONNEL OFFICE MUST NOTIFY CIVILIAN PAYROLL OFFICE VIA COMMAND LETTER WITH THE FOLLOWING:

1. Statement if Unemployment Benefits are to be deducted, with dollar amount, address and POC to send.
2. Statement that employee was counseled concerning Health Benefits and TSP and the election forms if necessary.
3. Statement concerning entitlement to overtime, night differential, shift premium, Sunday Premium, etc, with number of hours and dates for each entitlement.
4. If Back Pay Settlement was prior to conversion to DCPS (Defense Civilian Pay System), a statement certifying any lump sum payment with number of hours and amount paid and/or any severance pay that was paid with dollar amount.
5. Statement if interest is payable with beginning date of accrual.
6. Corrected Time and Attendance if applicable.

ATTACHMENTS TO THE LETTER SHOULD BE AS FOLLOWS:

1. Copy of Settlement Agreement and/or the MSPB Order.
2. Corrected or cancelled SF 50's.
3. Election forms for Health Benefits and/or TSP if applicable.
4. Statement certified to be accurate by the employee which includes:
   a. Outside earnings with copies of W2's or statement from employer.
   b. Statement that employee was ready, willing and able to work during the period.
   c. Statement of erroneous payments employee received such as; lump sum leave, severance pay, VERA/VSIP, retirement annuity payments (if applicable) and if employee withdrew Retirement Funds.
5. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.

USDA UNITED STATES DEPARTMENT OF AGRICULTURE

NATIONAL FINANCE CENTER CHECKLIST FOR BACK PAY CASES

Below is the information/documentation required by National Finance Center to process payments/adjustments agreed on in Back Pay Cases (settlements, restorations) or as ordered by the Merit Systems Protection Board, EEOC, and courts**.**

1. Initiate and submit AD-343 (Payroll/Action Request) with clear and concise information describing what to do in accordance with decision.

2. The following information must be included on AD-343 for Restoration:

a. Employee name and social security number.
b. Detailed explanation of request.
c. Valid agency accounting.
d. Authorized signature (Table 63)
e. If interest is to be included.
f. Check mailing address.
g. Indicate if case is prior to conversion. Computations must be attached.
h. Indicate the amount of Severance and Lump Sum Annual Leave Payment to be collected. (if applicable)

Attachments to AD-343

1. Provide pay entitlement to include Overtime, Night Differential, Shift Premium, Sunday Premium, etc. with number of hours and dates for each entitlement. (if applicable)

2. Copies of SF-50's (Personnel Actions) or list of salary adjustments/changes and amounts.

3. Outside earnings documentation statement from agency.

4. If employee received retirement annuity or unemployment, provide amount and address to return monies.

5. Provide forms for FEGLI, FEHBA, or TSP deductions. (if applicable)

6. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.

7. If employee retires at end of Restoration Period, provide hours of Lump Sum Annual Leave to be paid.

NOTE: If prior to conversion, agency must attach Computation Worksheet by Pay Period and required data in 1-7 above.

The following information must be included on AD-343 for Settlement Cases: (Lump Sum Payment, Correction to Promotion, Wage Grade Increase, FLSA, etc.)

a. Must provide same data as in 2, a-g above.
b. Prior to conversion computation must be provided.
c. Lump Sum amount of Settlement, and if taxable or non-taxable.

If you have any questions or require clarification on the above, please contact NFC's Payroll/Personnel Operations at 504-255-4630.